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Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-432, 78-435, 78-436

UNITED STEELWORKERS OF AMERICA, AFL-CIO, *et al.*,
Petitioners,

—v.—

BRIAN F. WEBER, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AND THE SOCIETY OF AMERICAN LAW TEACHERS BOARD OF GOVERNORS *AMICI CURIAE*

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IN THE
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UNITED STEELWORKERS OF AMERICA, AFL-CIO, et al.,

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AND THE SOCIETY OF AMERICAN LAW TEACHERS BOARD OF GOVERNORS AMICI CURIAE

Interest of the Amici*

The American Civil Liberties Union for 59 years has devoted itself exclusively to protecting the fundamental rights of the people of the United States.

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* The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court pursuant to Rule 42(2) of the Rules of this Court.

For nearly a decade, the governing board of our 200,000-member national organization has vigorously debated the issue of "affirmative action"--particularly when the need to eradicate the cumulative effects of systemic discrimination against minorities results in the adoption of race conscious numerical measures.

The intensity and vigor of these discussions have heightened the ACLU's realization that the major civil liberties issue still facing the United States is the elimination, root and branch, of all vestiges of racism. No other right surpasses the wholly justified demand of the nation's discrete and insular minorities for access to the American mainstream from which they have so long been excluded. In recognition of this right, the ACLU has adopted the following statement of policy:

> "The root concept of the principle of non-discrimination is that individuals should be treated individually, in accordance with their personal merits, achievements and potential, and not on the basis of the supposed attributes of any class or caste with which they

> may be identified. However, when discrimination--and particularly when discrimination in employment and education--has been long and widely practiced against a particular class, it cannot be satisfactorily eliminated merely by the prospective adoption of neutral, 'color-blind' standards for selection among the applicants for available jobs or educational programs. Affirmative action is required to overcome the handicaps imposed by past discrimination of this sort; and, at the present time, affirmative action is especially demanded to increase the employment and the educational opportunities of racial minorities."

Pursuant to this policy, the ACLU supports, as an affirmative action measure, the use of "in-service training" which will "develop or upgrade the potential performance of under-represented groups in order to assure their retention and make the affirmative action program work in practice." The ACLU has further recognized that "in order to eradicate the effects of past discrimination and to increase the representation of substantially underrepresented groups," it is at times necessary to "support a requirement that a certain number of

persons within a group which has suffered discrimination be employed within a particular timetable." This is such a case. Accordingly, the ACLU urges this Court to reverse the decision of the United States Court of Appeals for the Fifth Circuit.

The Society of American Law Teachers is a professional organization, formed in 1973, of approximately 500 professors of law at more than 120 law schools in the United States. Among its stated purposes is the encouragement of fuller access of racial minorities to the legal profession; since its inception the Society has been active in supporting the adoption and maintenance of special minority admissions programs at American law schools. Its position is that voluntary affirmative action programs are fully consistent with the requirements of the federal laws designed to eradicate racial discrimination. The Society believes that affirmance of the decision below would seriously jeopardize the efforts of all American institutions which are trying to end the historic exclusion of blacks

and other racial minorities from the American mainstream.

For these reasons, the Society of American Law Teachers joins in this brief urging this Court to reverse the decision of the United States Court of Appeals for the Fifth Circuit, and to uphold the legality of voluntary affirmative action.

STATEMENT OF THE CASE

Pursuant to their 1974 Labor Agreement, petitioner Kaiser Aluminum & Chemical Corporation [hereinafter "Kaiser"] and petitioner United Steelworkers of America [hereinafter "Steelworkers"] agreed to institute on-the-job training programs in skilled craft classifications for the benefit of incumbent minority and white employees. In order to meet its affirmative action goal which it established pursuant to Executive Order 11246, Kaiser agreed with the Steelworkers that in the new on-the-job training programs "not less than one minority employee will enter for every nonminority employee entering until the goal is reached unless at a particular time there are insufficient available qualified minority candidates." 1974 Labor Agreement, Addendum to Art. 9. See 563 F.2d at 222; 415 F.Supp. at 763.

The one-to-one entry ratio of this new training program was challenged as violative of Title VII by respondent Brian Weber, an incumbent unskilled white employee at Kaiser's plant in Gramercy,

Louisiana, who but for the 1974 Labor Agreement would have had no opportunity for employment in a skilled craft position. The district court upheld respondent Weber's challenge and enjoined petitioners from implementing their new training program with its one-to-one ratio. 415 F.2d 761 (E.D. La. 1976). A majority of a panel of the court of appeals affirmed. 563 F.2d 216 (5th Cir. 1977) (per Judges Gee and Fay; Judge Wisdom dissenting). Rehearing was denied. 571 F.2d 337 (5th Cir. 1978).

In reaching their decisions, the courts below found that Kaiser, prior to 1974, had maintained a nondiscrimination policy and in fact had not unlawfully discriminated against minorities in the past. 563 F.2d at 224; 415 F.Supp. at 764. Given the attenuated trial in this case, and especially given the interests and potential liabilities of the respective parties, that finding is hardly surprising.[1/] That finding, nonetheless,

1. This finding of no past discrimination against minority workers is not binding here because the courts below erred as a matter of law in applying Title VII law to Kaiser's past

does not alter the impact of other important facts in this case: (1) that petitioners[2/] reasonably could have believed that they had in the past discriminated unlawfully against minority workers; (2) that petitioners in fact were confronted with a prima facie case of unlawful discrimination against minority workers; (3) that petitioners' employment statistics manifested a severe deficiency in minority worker utilization; (4) that petitioners were confronted with possible liability in a minority or EEOC instituted lawsuit, and with possible loss of lucrative government contracts through enforcement of Executive Order 11246 by the Office of Federal Contract Compliance

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employment practices. In any event, other findings fully support the proposition that petitioners reasonably could have believed that they had discriminated unlawfully against minority workers in the past. See, pp. 9-16, infra.

2. Although the United States and the EEOC also are petitioners in this Court, they are not referred to in this brief. Our references to "petitioners" herein thus is intended to apply only to Kaiser and the Steelworkers.

Programs [hereinafter "OFCCP"]; (5) that petitioners were well aware of the government negotiations with the steel industry which led to the Steel Industry Consent Decree; and (6) that petitioners, aware of these facts, negotiated their 1974 Labor Agreement which denied no seniority expectations or job security to any incumbent white employees but which instead created new employment opportunities both for incumbent white employees and for incumbent minority employees.

Only through a review of this important factual background can the propriety of petitioners' 1974 Labor Agreement be fairly analyzed.

A. Petitioners Reasonably Could Have Believed That They Had Discriminated Unlawfully Against Minority Workers

Kaiser opened its Gramercy plant in 1958. 563 F.Supp. 224; 415 F.Supp. 764. At that time, by law and tradition, nearly all employment opportunities in the South were rigidly segregated. Kaiser does not appear to have violated tradition: in a

minority-initiated Title VII case, a unanimous court of appeals panel found that at Kaiser's plant in nearby Chalmette, Louisiana, "the physical facilities of the plant were rigidly segregated" prior to the effective date of Title VII. Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374, 1378 (5th Cir. 1978).

Although segregation did not require denial of all employment to minorities, it did relegate minorities to the lowest paying, least desirable jobs. Skilled craft jobs were high paying, desirable jobs rarely if ever filled by minorities. At Kaiser's plant in Chalmette, minorities had been hired "only as laborers." Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374, 1378 (5th Cir. 1978).

Prior to the 1974 Labor Agreement, Kaiser did not hire skilled craft employees from among its incumbent unskilled workforce. Instead, it hired experienced craft workers from outside its plants. This was so at its Chalmette plant, Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374, 1381 (5th Cir. 1978), and also at its Gramercy plant, 563 F.2d at 218,

231-232; 415 F.Supp. at 764.

In hiring skilled craft employees at its Gramercy plant, Kaiser used a purportedly neutral criterion which had a discriminatory effect.[3/] Prior to the 1974 Labor Agreement, Kaiser required craft applicants at its Gramercy plant to have prior craft experience. 563 F.2d at 218, 224, 231-232; 415 F.Supp. at 764. The discriminatory effect of this purportedly neutral practice resulted in a skilled craft workforce at Kaiser's' Gramercy plant which was only 2%-2 1/2% minority, 563 F.2d at 224; 415 F.Supp. at 764, in a community with a relevant labor force which was 39% minority, 563 F.2d at 222. Kaiser's maintenance of an identical prior craft experience requirement at its Chalmette plant had a

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3. The record here does not reflect whether discriminatory written tests and diploma requirements were used by Kaiser to select its craft workers at its Gramercy plant prior to 1974. But Kaiser probably used the same criteria as it did at its Chalmette plant where Kaiser regularly used discriminatory, unvalidated, and hence unlawful written tests and diploma requirements. Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374, 1381 (5th Cir. 1978).

similarly severe discriminatory effect, a reality which led the Fifth Circuit to hold "that the [minority] plaintiff made a prima facie showing that the current system, with its prior experience requirement, is discriminatory in effect." Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374, 1390 (5th Cir. 1978).

In view of these practices, Kaiser reasonably could have believed that it had discriminated unlawfully against minority workers. Griggs v. Duke Power Co., 401 U.S. 424 (1971); and Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). "Those cases make clear that to establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern." Dothard v. Rawlinson, 433 U.S. 321, 329 (1977).

Significantly, Kaiser's discriminatory employment practices not only were known to the OFCCP but they were the subject of findings and recommendations by the OFCCP in 1971, and of a further report by the OFCCP in 1973.

In the 1973 report, the OFCCP found that Kiaser had engaged in discrimination against minority workers by waiving its prior craft experience requirement for whites but not for minorities. This finding served to confirm the OFCCP's findings and recommendations rendered two years earlier.

In 1971, after a full-scale compliance review, the OFCCP rendered general findings of discrimination against Kaiser on the grounds that Kaiser's hiring of craft workers at the Gramercy plant discriminated against minorities in violation of the Executive Order. The OFCCP at that time recommended that Kaiser establish a training program in which 50% of the craft trainees would be minority workers.[4/]

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4. Although the 1971 findings and recommendations and the 1973 report were not made a part of the record in the district court, they have been lodged with the Clerk of this Court by petitioners United States and EEOC in No. 78-436.

In any event, the district court found that one of petitioner's "prime motivations" for adopting the one-to-one training ratio was "satisfying the requirements of the OFCC." 415 F.Supp. at 765; see also, 563 F.2d at 218.

B. Petitioners In Fact Were Confronted With A Prima Facie Case Of Unlawful Discrimination Against Minority Workers

Kaiser hired its Gramercy employees primarily from two parishes which together had a minority population of approximately 43% at the time of trial. 563 F.2d at 222 n.11, 228; 415 F.Supp. at 764. The labor market in those parishes was estimated to be 39% minority. 563 F.2d at 222 n.11, 228.

Kaiser's work force presented a totally different picture. At the time of trial, the Kaiser work force at its Gramercy plant was 14.8% minority. 563 F.2d at 224, 228; 415 F.Supp. at 764.

Kaiser's skilled work force in its craft positions was even more severely underrepresentative. Prior to the 1974 Labor Agreement, only 5 minority workers had been hired into those positions--resulting in a skilled work force which was only 2%-2 1/2% minority. 563 F.2d at 224; 415 F.Supp. at 764. In fact, Kaiser's skilled work force may have been only 1.7% minority. 563 F.2d at 228.

These statistics alone, for which petitioners were fully accountable, were and remain sufficient to create a prima facie case of discrimination. As this Court explained in Teamsters v. United States, 431 U.S. 324 (1977):

> "Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance often is a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring policies will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." 431 U.S. at 339 n.20.

As in Teamsters, the statistics here established a prima facie case of discrimination. 431 U.S. at 337-343. See also, Dothard v. Rawlinson, 433 U.S. 321, 329-330 (1977) (the relevant labor market which was 36.9% female compared with employer's work force which was only 12.9% female established a prima facie case of discrimination).

Aware of its statistics, coupled with its discriminatory prior experience requirement, Kaiser was sitting on a prima facie case of discrimination at its Gramercy plant no different from that at its Chalmette plant. Compare the statistical prima facie case in Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374, 1378, 1389-1390 (5th Cir. 1978).

C. Petitioner's Employment Statistics Manifested A Severe Deficiency In Minority Worker Utilization

As a government contractor, Kaiser is bound by the requirements of Executive Order 11246 and the rules and regulations promulgated thereunder. Even without regard to Kaiser's past practices and its prima facie case of discrimination, Kaiser was required by §202 of Executive Order 11246 to "take affirmative action."

Evidence of affirmative action is manifested initially by the existence of an affirmative action program. As described in regulations promulgated by

the Secretary of Labor, an "affirmative action program is a set of specific and result oriented procedures." 41 C.F.R. §60-2.10. An essential part of an affirmative action program is the establishment of "goals and timetables" for positions in which the employer "is deficient in the utilization of minority groups and women." Id.

In order to establish their goals and timetables and their result oriented procedures to attain those goals and timetables, employers such as Kaiser are required to conduct a "utilization analysis," which includes both an analysis of the employer's work force and an analysis of labor force availability. 41 C.F.R. §60-2.11. Underutilization exists when the utilization analysis shows that the employer has "fewer minorities or women in a particular job than would be expected by their availability." Id. Underutilization of minorities, the Secretary of Labor has pointed out, is especially likely to exist in skilled craft jobs. Id.

A utilization analysis for skilled

craft jobs at Kaiser's Gramercy plant was quite simple to perform--especially in 1974 when the prior craft experience requirement was eliminated. A work force analysis would have revealed less than 2 1/2% minority representation in Kaiser's skilled crafts; the availability analysis would have revealed 39% minority worker availability. 563 F.2d at 224, 228; 415 F.Supp. at 764.

Given Kaiser's severe deficiency in its utilization of minority workers, it was required by Executive Order 11246 and the regulations thereunder to establish goals and timetables with specific result oriented procedures to attain its goals.

D. Petitioners Were Confronted With Possible Liability In A Minority Or EEOC Initiated Lawsuit, And With Possible Loss Of Lucrative Government Contracts Through Enforcement Of Executive Order 11246 By The OFCCP

Petitioners Kaiser and Steelworkers, with their reasonable belief that they had discriminated unlawfully against minority workers and with their prima facie case of unlawful discrimination,

were ready targets for a minority or EEOC initiated lawsuit under Title VII. Cf., Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374 (5th Cir. 1978). Given those facts and also given Kaiser's severe deficiency in utilization of minority workers, Kaiser also faced the very real possibility of OFCCP enforcement under Executive Order 11246.

Potential Title VII liability could hardly have been appealing to Kaiser and the Steelworkers. Rather than choosing to leave the seniority of their incumbent employees intact, they faced the possibility of a court-ordered restructuring of their seniority placement in order to provide rightful place seniority to all minorities who had been discriminated against. Teamsters v. United States, 431 U.S. 324 (1977); Franks v. Bowman Transportation Co., 424 U.S. 747 (1976). And despite any asserted absence of discriminatory intent, they also could be held liable for class-wide back pay. Albemarle Paper Co. v. Moody, 422 U.S.

405 (1975).[6]

Kaiser's prospects under OFCCP enforcement of Executive Order 11246 were no more appealing. If Kaiser were found to be in noncompliance, the OFCCP under §209(a)(5) of the Executive Order could "cancel, terminate, suspend, or cause to be cancelled, terminated or suspended" all of Kaiser's current government contracts. If Kaiser were found to be a "nonresponsible" contractor, the OFCCP under §209(a)(6) of the Executive Order could require all federal agencies "to refrain from entering into contracts" with Kaiser.

These possibilities of Title VII liability and of OFCCP enforcement were

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6. In addition, of course, Kaiser faced the possibility of court-ordered goals and hiring ratios. See, Bridgeport Guardians v. Bridgeport Civil Service Commission, 482 F.2d 1333 (2d Cir. 1973), and Carter v. Gallagher, 452 F.2d 327 (8th Cir.), cert. denied, 406 U.S. 950 (1972), both cited with approval in Regents of the University of California v. Bakke, 57 L.Ed.2d 750, 778 (1978)(opinion of Powell, J.). See also, Morrow v. Dillard, 480 F.2d 1284 (5th Cir. 1978).

not fanciful to Kaiser and the Steelworkers. Two of Kaiser's Louisiana plants had already been sued by minority plaintiffs under Title VII.[7] And the OFCCP had already made findings of discrimination as to Kaiser's employment practices.[8] In view of these actions, as the majority of the court of appeals panel found, the training ratio set forth in "the collective bargaining agreement was entered into to avoid future litigation and to comply with threats of the Office of Federal Contract Compliance Programs [OFCCP] conditioning federal contracts on appropriate affirmative action." 563 F.2d at 218. See also, 415 F.Supp. at 765.

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7. The litigation against the Chalmette plant, commenced in 1967, is reviewed in Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374 (5th Cir. 1978). The litigation against Kaiser's plant in Baton Rouge, also commenced in 1967, was settled by a consent decree costing Kaiser $255,000 in class back pay, Burrell v. Kaiser Aluminum & Chemical Corp., Civ. No. 67-86 (M.D. La., consent decree filed Feb. 24, 1975).

8. See note 4, supra, and accompanying text.

E. Petitioners Were Aware Of The Government Negotiations With The Steel Industry Which Led To The Steel Industry Consent Decree

At the time that the Steelworkers union was negotiating its contract with Kaiser in late 1973 and early 1974, the union also was involved in the final stages of equal employment negotiations with nine major steel companies, the EEOC and the Department of Labor's OFCCP. When those negotiations were successfully completed, the United States (on behalf of the EEOC and the Department of Labor) filed suit to enforce Title VII and Executive Order 11246 against the nine major steel companies and the Steelworkers with regard to the employment practices at approximately 250 steel plants. On the same day suit was filed, April 4, 1974, the parties filed and a district court approved two consent decrees. See Steel Industry Consent Decree, BNA Fair Employment Practices Manual ["FEP"], 431:125-152 (1974), reviewed and approved in United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976).

The Steel Industry Consent Decree contained a standard disclaimer of liability. BNA FEP 431:125-126.[9/] It required goals and timetables, and created a one-to-one, minority-to-white training ratio for each craft at each plant. BNA FEP 431:138-139.[10/] The price of enforced compliance

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9. In the introduction to the Consent Decree, the companies and union "expressly deny" any "failure to comply" with Title VII and E.O. 11246. BNA FEP 431:125. In the preamble, ¶B adds a similar disclaimer, stating that nothing in the decree "shall be construed to be, or shall be admissible in any proceeding as evidence of, an admission by defendants" of Title VII or E.O. 11246 violations. BNA FEP 431:126.

10. In ¶10 of the Decree, defendants agreed to implement goals and timetables for minorities and women in each trade and craft based upon a "utilization analysis of the craft jobs in each Trade and Craft" conducted pursuant to the OFCCP regulations in 41 C.F.R. Part 60-2 issued under Executive Order 11246. In order to meet the goals and timetables, defendants agreed in ¶10(d) to an "implementing ratio of 50%...for each Trade and Craft grouping at each plant, to the extent that qualified applicants from such groups are available within the plant, until the goals therefor have been achieved." In what is known as a seniority override, ¶10(e) provided: "In order to meet the implementing ratio, seniority factors shall be applied separately to each group for whom timetables are established and to all other employees." BNA FEP 431:138-139.

did not come cheap: the Consent Decree established a back pay fund for minority employees totaling more than $30 million. BNA FEP 431:143.

F. Aware Of These Facts, Petitioners Negotiated Their 1974 Labor Agreement Which Denied No Seniority Expectations Much Less Job Seniority To Incumbent White Employees But Which Instead Created New Employment Opportunities For Minority And White Incumbent Employees

In view of their past employment practices, in view of their prima facie case of unlawful discrimination against minority workers, in view of their deficiency in minority worker utilization, in view of potential liability to minorities in Title VII litigation and of possible additional enforcement of the Executive Order by OFCCP, and in view of the Steel Industry Consent Decree--in view of all of these factors--petitioners Kaiser and Steelworkers negotiated their 1974 Labor Agreement.

Neither in that agreement or apart from that agreement did they restructure seniority expectations by providing rightful place seniority to minority

employees, nor did they establish a back pay fund. Instead, they took another very important step in achieving voluntary compliance with Title VII and Executive Order 11246.

Petitioners Kaiser and the Steelworkers for the first time opened their craft training programs to incumbent employees. By this step, they sought to remedy their deficiency in minority worker utilization by establishing a one-to-one, minority-to-white training ratio. 563 F.2d at 222; 415 F.Supp. at 763. These provisions, identical to those in the Steel Industry Consent Decree, compare, BNA FEP 431:138-139, were "incorporated in the national collective bargaining agreement, governing fifteen Kaiser plants across the country. Very similar provisions were included in the Union's contracts with the other two major American aluminum producers, Reynolds Metals and ALCOA." 563 F.2d at 229.

The 1974 Labor Agreement may have disappointed some long-passed over minority workers. But Kaiser and the Steelworkers undoubtedly believed that

they had well represented all of their employees, minority and white alike. They finally had provided an opportunity for minority entry into the skilled crafts. And they did so without upsetting seniority placement. "No white workers lost their jobs, none had expectations disappointed." 563 F.2d at 234. They were able to accomplish this through the creation of new training programs which provided new opportunities to minority and white incumbent employees. "None of the white or black employees affected by this proposal had any chance to receive craft training from Kaiser before the 1974 Agreement."[11/] 563 F.2d at 234.

The 1974 Labor Agreement marked an additional accomplishment for Kaiser and the Steelworkers. Without the time and

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11. During the one year that the new training opportunities existed at the Gramercy plant, before the program was enjoined by the district court, 12 incumbent employees (7 minority and 5 white) who had no chance to enter the skilled craft positions prior to 1974 were accepted for skilled craft training. 563 F.2d at 222-223; 415 F.Supp. at 764.

expense of another minority initiated lawsuit under Title VII, without the time and expense of an EEOC lawsuit under Title VII, without the time and expense of OFCCP enforcement proceedings under Executive Order 11246, and without the expenditure of judicial time and effort, Kaiser and the Steelworkers exemplified the ideals of pursuing voluntary compliance with the means and objectives of equal employment opportunity. Kaiser complied with its very specific obligations under the Executive Order. And Kaiser and the Steelworkers, based at a minimum upon the one-to-one training ratio in the Steel Industry Consent Decree, believed that they were complying with Title VII.

SUMMARY OF ARGUMENT

The race conscious training program for skilled craft positions, adopted by petitioners Kaiser and the Steelworkers at the same time that they opened these skilled craft positions for the first time to incumbent employees such as respondent Weber, represents a reasonable and lawful effort to remedy the near-total exclusion of minority workers from the skilled crafts while also providing new employment opportunities to incumbent white workers. This race conscious remedial effort does not contravene but instead is fully consistent with the language and objectives of Title VII and Executive Order 11246.

Despite superficial similarities to Regents of the University of California v. Bakke, 57 L.Ed.2d 750 (1978), this case has arisen on very different facts and in a quite distinct legal context. In Bakke, (1) the race conscious program was undertaken by a state entity bound by the Fourteenth Amendment; (2) implementation of the program defeated the

expectations of some white applicants who arguably were better qualified on paper than some of the minority applicants; and (3) adoption of the program was premised upon remedying societal discrimination against minorities and not upon the user's reasonable belief that it itself had engaged in unlawful past discrimination against minorities. The issue here is posed in a quite dissimilar context. Here, (1) the race conscious program was established by private parties encouraged to undertake such programs by Title VII and Executive Order 11246; (2) implementation of the program defeated no expectations of white workers, involved no claims that the white workers were more qualified than the minority workers, and in fact created new advancement opportunities for the white workers as well as for minority workers; and (3) adoption of the program was premised upon the users' reasonable belief that they had engaged in unlawful past discrimination against minorities.

A. Voluntary compliance with Title VII and Executive Order 11246 through the adoption of race conscious measures has been repeatedly recognized by the courts of appeals and by this Court as necessary "'to eliminate, as far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.'" Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-418 (1975) (citation omitted). When an employer has a deficiency in minority worker utilization, and especially when there are reasonable grounds to believe that the employer has discriminated against minority workers in the past, Title VII not only permits but encourages voluntary compliance through the adoption of race conscious numerical measures which provide minority worker entry to the work place. In these same circumstances, Executive Order 11246 explicitly encourages the adoption of such race conscious numerical measures. In view of the fact that "[c]ooperation and voluntary compliance" are the "preferred means" of achieving

the remedial objectives of Title VII and the Executive Order, Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974), Title VII cannot be violated by a reasonably-based, race conscious numerical measure which is voluntarily adopted in order to accomplish those objectives.

B. The use of race conscious numerical measures, permissible under Title VII and explicitly encouraged under Executive Order 11246, has been ratified by Congress on three occasions in the past decade. (1) In 1969, Congress debated the legality of the race conscious numerical measures in the Philadelphia Plan and ultimately endorsed those measures as appropriate under Executive Order 11246 and Title VII. (2) In 1971-1972, during its consideration of the Equal Employment Opportunity Act of 1972, Congress forthrightly rejected one amendment in the House and two amendments in the Senate that would have prohibited the EEOC and the OFCCP from requiring race conscious numerical

measures. (3) More recently, in 1978, Congress again rejected amendments which would have barred federal agencies from requiring the adoption of race conscious numerical measures. Congress' explicit approval of race conscious numerical measures cannot be undermined by this Court.

C. Even if this Court repudiates the objectives of Title VII and Executive Order 11246 and rejects Congress' express ratification of the use of race conscious numerical measures, the court below erred in attempting to resolve the legality of the remedial measure without a meaningful adversary hearing. If judicially determined past discrimination is a necessary prerequisite to a race conscious remedial plan, the presence or absence of such discrimination cannot be determined without an adversarial contest. Given the interests of all the parties in the district court of denying the existence of actual unlawful discrimination, procedural fairness and Rule 19(a) F.R. C.P. required the joinder of the affected

minority workers as necessary parties. Additionally, given the traditional allocation of burdens of proof, respondent Weber, as plaintiff below, was required to prove the absence of unlawful discrimination against the minority workers. Neither procedure was followed by the district court. Thus, even under respondents' erroneous theory in this case, the district court's procedural errors require a reversal of the judgment below.

ARGUMENT

A. Petitioners' Race Conscious Training Program Does Not Unfairly Discriminate Against White Workers. Rather, It Serves The Moral And Legal End Of Remedying A Form Of Unjust Enrichment Caused By Reasonably Apprehended Racial Discrimination Against Minority Workers At Kaiser's Gramercy Plant

1. There Is An Interlocking Relationship Between Racial Discrimination Against Minorities, Unjust Enrichment For Whites And Race Conscious Remedial Plans

This Court has recognized that judicially imposed remedial plans aimed at eradicating the effects of unlawful racial discrimination by an employer may adversely affect white workers who did not participate directly in the discrimination.[12/]

12. A serious question exists in this case as to whether any white worker can be said to be adversely affected by the training program established by petitioners. Prior to the training program, no incumbent employee--black or white--was eligible for apprenticeship trade or craft training. Thus, the challenged program actually benefits the very incumbent white workers who challenge it. Cf., Beer v. United States, 425 U.S. 130 (1976) (reapportionment which incrementally improves status of black voters does not violate §5 of the Voting Rights Act). Moreover, it is clear that whatever seniority

E.g., Franks v. Bowman Transportation Co., 424 U.S. 747 (1976); Albemarle Paper Company v. Moody, 422 U.S. 405 (1975). See also, Teamsters v. United States, 431 U.S. 324 (1977). In approving such

advantages incumbent white workers may have believed they possessed in gaining access to the training program, those advantages were subject to revision during the collective bargaining process.

Seniority rights are not vested in individual employees; rather, a collective bargaining representative may alter and even lessen seniority expectations of individual union members in order "to promote the long range social or economic welfare of those it represents." Ford Motor Co. v. Huffman, 345 U.S. 330, 342 (1953). As Mr. Justice Burton wrote for a unanimous Court, there is no requirement for "a bargaining representative to limit seniority clauses solely to the relative lengths of employment of the respective employees." Id.

While union bargaining representatives thus are free to alter seniority rights, they are duty-bound to represent not just the concerns of the white membership but also the interests of minority workers. Steele v. Louisville & Nashville R.R., 323 U.S. 192, 203 (1944). That representation, of course, may include corrective action. "There is nothing in the law which preclude[s] [a] union from recognizing the injustice done to a substantial minority of its members and from moving to correct it." Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969). Similarly, there is nothing in the law which prohibits a union from representing its minority workers by negotiating an affirmative

remedies, this Court correctly assumed that the moral and legal legitimacy of a race conscious employment remedy rests upon the notion that it is designed to

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action override altering seniority expectations. E.g., United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976); Patterson v. Newspaper & Mail Deliverers' Union of New York, 514 F.2d 767 (2d Cir. 1975), cert. denied, 427 U.S. 911 (1976).

When a union represents the interests of its black workers by negotiating an affirmative action override, the seniority expectations of some white workers undoubtedly will be affected. But changed expectations do not give rise to a viable complaint by a white worker. As the Court of Appeals for the Second Circuit recognized in Patterson v. Newspaper & Mail Deliverers' Union of New York, supra, the white worker "may well have been the modest beneficiary, vis-a-vis the minority work force, of a policy that discouraged minority persons from [obtaining employment]." 514 F.2d at 767. "In any event, it must be recognized that rights of the kind [that the white] workers here assert 'are not indefeasibly vested rights but mere expectations derived from a bargaining agreement and subject to modification.'" Id. (citation omitted).

In Franks v. Bowman Transportation Co., 424 U.S. 747 (1976), the Court applied the foregoing principles in the context of our national policy of eliminating the effects of past discrimination.

> "This Court has long held that employee expectations arising from a seniority system agreement may not be modified by statutes furthering a strong public

redress the lingering effects of unlawful racial discrimination. Teamsters v. United States, 431 U.S. 324 (1977). The effect of racial discrimination which a remedial plan may legitimately seek to erase is not, however, confined solely to an estimate of the pecuniary loss suffered by the victims. Rather, it includes the identification and equitable allocation of unjust enrichment attributable to racial discrimination.

Given our fundamental assumption that people of all races are created

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> policy interest... The Court has also held that a collective bargaining agreement may go further, enhancing seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement... And the ability of the union and the employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of 'the highest priority,' is certainly no less than in other areas of public policy interests." 424 U.S. at 778-779 (citations omitted).

equal, but for extraneous factors--chiefly race prejudice--the distribution of desirable jobs in an employment setting should, over time, approximate the racial composition of the surrounding community. Cf., Castaneda v. Partida, 430 U.S. 482 (1977). It is an unfortunate reality of American life that race prejudice has systematically hindered minorities from gaining access to desirable jobs in a wide variety of employment settings, especially in the skilled trades. The historical exclusion of minorities from access to an equitable share of desirable jobs has had a two-fold effect. First, it has consigned many to a life of privation and poverty. Second, and more importantly for the purposes of this case, it has often conferred an involuntary benefit upon even the most "innocent" of whites since, although the number of desirable jobs remains roughly constant, the elimination of minority workers as effective competitors results in a higher proportionate availability of desirable jobs for each white applicant. Thus, race prejudice on the job confers an often involuntary benefit upon even

those white workers who deplore racial discrimination.[13/]

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13. The unjust enrichment may be described as follows:

Let: a = total number of potential competitors of all races for desirable jobs in a given employment setting
b = available number of desirable jobs
c = individual allocation of desirable jobs which would result from allocation solely on basis of individual merit
x = members of racial minority removed from effective competition for desirable jobs by racial discrimination
y = individual allocation of desirable jobs which results from competition in absence of excluded minority applicants

$$\frac{b}{a} = c$$

$$\frac{b}{a-x} = y$$

$$y-c = z$$

z = unjust enrichment factor

The unjust enrichment impact of race prejudice is most graphically illustrated by the example of Major League baseball. Prior to Jackie Robinson's emergence, the fixed number of jobs on the 16 Major League rosters were held solely by whites because blacks were excluded from competing for them. As we now recognize, numerous black athletes would, if given the opportunity, have displaced white players from the rosters. The fact that the white players--even those wholly innocent of racial prejudice--retained jobs solely because blacks were excluded from competing for them is a graphic form of unjust enrichment.

The advantageous employment position enjoyed by a white worker which is ignored by a race conscious employment remedy is often just such an involuntary benefit caused by someone else's racial discrimination. As such, it is a legitimate target for a remedy which seeks to reconstruct the work force, over time, as if no racial discrimination had slowed its racial distribution. Cf., Franks v. Bowman Transportation Co., 424 U.S. 747 (1976). Thus, in order to be justified, a race conscious employment remedy should either (1) seek to shift loss caused by racial discrimination to the guilty party[14]; or (2) seek to identify and equitably allocate the involuntary benefits (unjust enrichment) attributable to racial discrimination. Since no allegations exist that respondents here have themselves engaged in racial discrimination, the remedial numerical measure at issue in this case depends for its legitimacy upon a showing that it is aimed at identifying and remedying a form of unjust enrichment attributable to reasonably apprehended racial discrimination.

14. The grant of back pay in a Title VII case is the classic example of a loss shifting remedy.

At least three approaches exist to the problem. First, respondents' polar position argues that an employer and a union, confronted with allegations that their racial policies conferred an indirect benefit on white workers by increasing their access to craft jobs at the expense of minority workers, are powerless to evolve remedial plans aimed at redressing possible unjust enrichment --unless and until a court certifies that unlawful racial discrimination occurred at the plant in question.

The contrasting polar approach argues that Kaiser and the Steelworkers were free to recognize that racial discrimination practiced by third parties throughout society--including state and local governmental units in Louisiana--conferred an indirect benefit upon white workers seeking access to craft jobs justifying a reasonable remedial attempt to identify and reallocate the unjust enrichment.

Finally, an intermediate position urged by Amici argues that where an employer and a union reasonably apprehend that they may have engaged in unlawful racial practices, they may establish good faith voluntary plans to remedy the effects of such reasonably apprehended racial discrimination without waiting for governmental permission or exposing themselves to retrospective liability. Cf., United Jewish Org. of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977) (race conscious reapportionment valid because intended to redress effect of reasonably apprehended violation of §5 of Voting Rights Act).

2. Private Parties May Adopt Remedial Plans Aimed At Redressing The Effects Of Reasonably Apprehended Racial Discrimination In Employment Without Awaiting Governmental Permission Or Exposing Themselves To Retrospective Liability

a. Law And Logic Encourage Adoption Of Remedial Plans

So long as private parties are confronted with a reasonable basis for

fearing that they may have engaged in unlawful racial discrimination in employment, they should be encouraged to adopt voluntary remedial plans designed to remedy the effects of reasonably apprehended racial discrimination.[15] Respondents appear to argue that a standard of reasonable belief of past discrimination as a justification for a private remedial plan is insufficiently high; they argue that only a judicial certification of the occurrence of unlawful past racial discrimination renders its existence sufficiently certain to justify a race conscious remedy. Thus, they argue, private parties wishing to evolve a remedy for the effects of past discrimination in which they reasonably fear they may have engaged must first be found guilty of unlawful discrimination in a judicial forum.

Any requirement for a judicial

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15. The preference for voluntary compliance contained in Title VII and Executive Order 11246 is discussed at pp. 49-55, infra.

finding of guilt in order to validate a private plan would all but preclude private persons beset with a reasonable fear of having violated the law from embarking upon a course of voluntary remedial activity, since the judicial finding of guilt would collaterally estop the party from defending subsequent actions designed to impose financial liability for the past discrimination. Parklane Hosiery Company, Inc. v. Shore, 47 U.S.L.W. 4079 (Jan. 9, 1979) (U.S. No. 77-1305). Respondents' refusal to permit private persons to remedy the effects of reasonably apprehended racial discrimination without exposing themselves to massive liability runs counter to settled jurisprudential norms. In a wide variety of settings, when persons fear that they may have violated the law, our system encourages voluntary remedial action in a procedural context which does not expose the party to retrospective liability. Thus, corporations accused of anti-trust violations are routinely encouraged to adopt remedial measures without admitting guilt or exposing themselves to retrospective

liability. E.g., Burbank v. General Electric Co., 329 F.2d 825, 834-835 (9th Cir. 1964); Triangle Industries, Inc. v. Kennicott Copper Corp., 402 F.Supp. 210 (S.D.N.Y. 1975). Persons accused of violating the nation's securities laws are encouraged to engage in private remedial action without exposing themselves to massive liability. E.g., Allegheny Corp. v. Kirby, 333 F.2d 327 (2d Cir. 1964), aff'd by an equally divided court en banc, 340 F.2d 311 (2d Cir. 1965), cert. dismissed, 384 U.S. 28 (1966). Similarly, persons accused of patent infringement,[16] tortious conduct,[17] and admiralty law violations[18] are routinely encouraged to engage in private remedial action without requiring an admission of culpability. It is, Amici submit, fully

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16. E.g., Kaspar Wireworks, Inc. v. Leico Engineering & Mach. Inc., 575 F.2d 530 (5th Cir. 1978); Sampson v. Radio Corp. of America, 434 F.2d 315 (2d Cir. 1970).

17. E.g., Bratt v. Western Airlines, 169 F.2d 214 (9th Cir. 1948), cert. denied, 335 U.S. 886 (19).

18. Sun Oil Co. v. Govoster, 474 F.2d 1048 (2d Cir. 1973); Seaboard Shipping Corp. v. Jocharanne Tugboat Corp., 461 F.2d 500 (2d Cir. 1972).

as important to encourage corporations to embark on a policy of remedying reasonably apprehended racial discrimination in employment as it is to encourage compliance with the nation's anti-trust, securities, patent, tort and admiralty laws. Just as it would be folly to require a judicial finding of guilt prior to permitting private remedial actions in an anti-trust or securities context, so is it inconsistent with our national commitment to the eradication of racial discrimination to lock persons onto the consequences of past discriminatory activity because the price of adopting a voluntary remedial plan is exposure to massive liability. See, United Jewish Org. of Williamsburgh v. Carey, 430 U.S. 144 (1977) (good faith intent to avoid violating §5 of the Voting Rights Act justifies race conscious reapportionment).

b. On The Facts Here, There Are No Risks In The Private Adoption Of Remedial Plans

Respondents argue that permitting private parties to establish remedial

plans to remedy "reasonably apprehended" racial discrimination creates an unacceptably high risk of unfair treatment of white workers. However, in the context of the present case, the risk of a bad faith private plan is non-existent. First, the private plan at issue in this case was not promulgated unilaterally, but was the result of an arms' length negotiation between entities of equal bargaining capacity. Second, one of the parties to the negotiation--the Steelworkers union--is charged with the duty of fair representation of all workers at the Gramercy plant--white and minority. E.g., Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944); Ford Motor Co. v. Hoffman, 345 U.S. 330 (1953); Humphrey v. Moore, 375 U.S. 335 (1964). Third, a reasonable basis existed for fearing that unlawful racial discrimination may have taken place at both the Gramercy and Chalmette plants. Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374 (5th Cir. 1978). Where, as here, such safeguards are present, no basis exists for refusing to encourage

voluntary compliance with the law. Where reasonable grounds exist to fear that past racial discrimination has infected the hiring process and where the remedial plan is embodied in a bona fide collective bargaining agreement, sufficient safeguards exist to encourage the private adoption of remedial plans without requiring a formal adjudication of guilt.

3. Voluntary Adoption Of Race Conscious Measures Is Consistent With And Specifically Encouraged By Executive Order 11246 And Title VII

While voluntary compliance is necessary in all areas of law, voluntary compliance with the objectives of employment discrimination law has been especially stressed as necessary "'to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.'" Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-418 (1975) (citation omitted). Without voluntary compliance, we as a nation will be unable even to approach

our objective "of ameliorating the effects of past racial discrimination, a national policy objective of the 'highest priority.'" Franks v. Bowman Transportation Co., 424 U.S. 747, 779 (1976).

a. Executive Order 11246 And Title VII Encourage Voluntary Compliance

The emphasis on voluntary compliance with Title VII and Executive Order 11246 is subsumed within the structure of the statute and the Order. But carrot and stick incentives for compliance also are provided. Under Title VII, the "'spur or catalyst'" for voluntary compliance is "the reasonably certain prospect" of a class-wide back pay award against an employer or union under §706(g), 42 U.S. C. §2000e-5(g). Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-418 (1975) (citation omitted). Under the Executive Order, an even greater incentive to an employer is the likelihood that its lucrative government contracts may be "cancelled, terminated or suspended," and that it will be debarred from

receiving future government contracts. See Executive Order 11246, §§209(a)(5) & (6).

Even without these specific incentives/sanctions, voluntary compliance nonetheless is an explicit and implicit objective--an objective most readily apparent from the statutory structure of Title VII. Section 706(b), 42 U.S.C. §2000e-5(b), requires the EEOC to "endeavor to eliminate" discrimination through "informal methods of conference, conciliation and persuasion." This statutory emphasis on informal methods has caused this Court to state on several occasions that "cooperation and voluntary compliance were selected as the preferred means for achieving [compliance with Title VII]." (emphasis added); quoted with approval in Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 367-368 (1977).

The courts of appeals (especially the U.S. Court of Appeals for the Fifth Circuit which has a considerable docket of employment discrimination cases) have

been no less aware of this emphasis on voluntary compliance: Title VII encourages "adjustment and settlement...short of litigation," Guerra v. Manchester Terminal Corp., 498 F.2d 641, 650 (5th Cir. 1974) (per Judge Goldberg); Title VII places "great emphasis upon private settlement and the elimination of unfair practices without litigation on the ground that voluntary compliance is preferable to court action," Hutchings v. United States Industries, Inc., 428 F.2d 303, 309 (5th Cir. 1970) (per Judge Ainsworth); "the central theme of Title VII is 'private settlement' as an effective end to employment discrimination," Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970) (per Judge Tuttle); Title VII has as a "primary goal the securing of voluntary compliance with the law," Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969) (per Judge Kerner); "voluntary compliance is preferable to court action," Dent v. St. Louis-San Francisco Ry. Co., 406 F.2d 399, 402

(5th Cir. 1969) (per Judge Coleman); it should be "clear that there is great emphasis in Title VII on private settlement and the elimination of unfair practices without litigation," Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 1968) (per Judge Bell).

Aside from being an important legal objective, voluntary compliance has an important practical side: it reduces the need for expanding federal agency enforcement machinery and it of course reduces the expenditure of enormous amounts of agency and judicial time. This is especially true where voluntary compliance incorporating broadly-based race conscious numerical measures is undertaken by a large employer, much less by an entire industry as was the case in the Steel Industry Consent Decree, BNA FEP 431:125-152 (1974), reviewed and approved in United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976). There, the court discussed in some detail the

practical side of why Title VII "places a premium on the achievement of voluntary compliance" through the adoption of race conscious numerical measures. 517 F.2d at 846. One obvious practical reason for the emphasis on voluntary compliance, the court noted, is that,

> "the EEOC's limited resources permit it to undertake serious conciliation or lawsuits in only a small fraction of the cases on its docket." 517 F.2d at 848.

Without considerable deference for voluntary compliance, our nation's

> "losses which must be considered include the nation's investment in the resources consumed by the federal agencies...as well as the chance justly to finalize a matter that otherwise would burden agencies and courts... for years to come." 517 F.2d at 851.

The burdens on the agencies and on the courts, without deference to voluntary compliance, indeed would be considerable. In fact, without the voluntary compliance achieved in the Steel Industry Consent

Decree (involving nine major employers, one union, and 250 plants), the court estimated that full litigation of the matter would have required "ten years to try just the liability issues" followed by trial of the remedial issues involving "over twenty-eight years of trial time." 517 F.2d at 851 n.28 (emphasis in original).

Ultimately, voluntary compliance is the preferred method of enforcement, especially where the voluntary compliance includes numerical measures providing minority entry into an employer's work force, for the simple reason that it furthers the objectives of Title VII and of Executive Order 11246. As the court stated in Patterson v. Newspaper & Mail Deliverers' Union of New York, 514 F.2d 767 (2d Cir. 1975), cert. denied, 427 U.S. 911 (1976) (upholding a voluntary compliance plan with numerical goals and timetables):

> "the clear policy in favor of encouraging settlements must... be taken into account particularly in an area where voluntary

> compliance by the parties over an extended period will contribute significantly toward ultimate achievement of Title VII's statutory goals." 514 F.2d at 771.

b. Compliance With Executive Order 11246 And Title VII Includes Adoption Of Race Conscious Measures

Voluntary compliance directed toward "ameliorating the effects of past racial discrimination, a national policy objective of the 'highest priority,'" Franks v. Bowman Transportation Co., 424 U.S. 747, 779 (1976) (citations omitted), includes and often requires the adoption of race conscious numerical measures. These numerical measures, adopted under Title VII and Executive Order 11246, have been widely pursued and judicially approved: (1) when premised upon findings of identifiable past discrimination; (2) when premised not upon identified discrimination but rather only upon underutilization of minority workers; and (3) when adopted in good faith with express disclaimers of any past discrimination.

These prospective race conscious measures which provide work place entry to minority workers, are fully consistent with the remedial objectives of Title VII and Executive Order 11246.

By 1964, Congress was well aware of the vastly unequal economic and social conditions imposed upon minorities in the work place by our society's pervasive racism. By enacting Title VII in 1964, and by extending it in 1972, Congress broadly sanctioned remedial efforts to change those unequal conditions. While it is true that Congress in 1964 did not require employers and unions to adopt affirmative race conscious numerical measures, neither did Congress prohibit adoption of such measures[17]; eight years

17. Section 703(j), 42 U.S.C. §2000e-2(j), at various times has been asserted as a prohibition against the use of race conscious numerical measures. But §703(j) on its face is not a prohibition but only a disclaimer that nothing in Title VII "shall require...preferential treatment...on account of an imbalance." 42 U.S.C. §2000e-2(j) (emphasis added). The unanimous interpretation of §703(j) by the courts of appeals

later, Congress did give its specific approval to the use of such numerical measures.[18] Being sidetracked here by the use of numerical measures, however, misses the point. For, what is significant is Title VII's objective of remedying societal discrimination.

Title VII, as this Court has repeatedly made clear, prohibits not

has been that the section has no effect upon race conscious numerical measures, whether ordered to remedy past discrimination, e.g., United States v. International Union of Elevator Constructors, 538 F.2d 1012 (3d Cir. 1976) (and cases cited therein), or whether adopted simply to remedy underutilization of minority workers, e.g., Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971).

Nonetheless, §703(j) continues to be raised at various times. In fact, respondent Weber relied on §703(j) in the court of appeals below. His argument was rejected out of hand by the panel majority for the obvious reason that "the issue" was "not whether preferential treatment is required but whether it is forbidden." 563 F.2d at 219.

18. Regardless of the meaning of §703(j) in 1964, Congress in 1971-1972 expressly adopted the use of race conscious numerical measures under Executive Order 11246 as not inconsistent with Title VII. This 1971-1972 legislative history of Title VII is set forth in some detail in Point B, infra.

only an employer's own intentionally discriminatory practices but also employment practices which merely inhibit minority participation because of societal discrimination. For example, when an employer uses a written test, a diploma requirement, or a prior experience requirement which has a discriminatory impact, the employer is merely perpetuating the inequalities created by centuries of discrimination. It is not the employer which necessarily denied the minority applicant test-taking ability, a diploma, or prior experience. Nonetheless, Title VII prohibits the employer's use of such criteria unless the employer can show that they are justified by a business necessity. Griggs v. Duke Power Co., 401 U.S. 424 (1971). This remedial burden is required regardless of the employer's culpability in order to remedy the continuing effects of pervasive societal discrimination. Id. And, when the business necessity burden cannot be met, as it most often cannot, the employer may continue its use of the

criteria only if it remedially adjusts the requirements so as to eliminate the discriminatory effect of the criteria. Albemarle Paper Co. v. Moody, 422 U.S. 405, 435 (1975).[19] This remedial

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19. The Court's approval of this remedy in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), was emphasized by Mr. Justice Brennan in Regents of the University of California v. Bakke, 57 L. Ed.2d 750 (1978):

> "In Albemarle, we approved 'differential validation' of employment tests. See 422 U.S., at 435. That procedure requires that an employer must ensure that a test score of, for example, 50 for a minority job applicant means the same thing as a score of 50 for a nonminority applicant. By implication, were it determined that a test score of 50 for a minority corresponded in 'potential for employment' to a 60 for whites, the test could not be used consistent with Title VII unless the employer hired minorities with scores of 50 even though he might not hire nonminority applicants with scores above 50 but below 60. Thus, it is clear that employers, to ensure equal opportunity, may have to adopt race-conscious hiring practices." 57 L.Ed.2d at 817 n.37 (opinion of Brennan, J.).

See also, Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §1607.14B(8)(d).

action, again, is required not because of the employer's culpability--although there is a causal connection--but as a remedy for the continuing effects of our pervasive past discrimination.[20]

The intent and effect of Executive Order 11246 in reaching and remedying societal discrimination is equally if not more apparent--for §202 of the Order

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20. As Justice Powell pointed out in Regents of the University of California v. Bakke, 57 L.Ed. 2d 750 (1978), the congressional findings supporting the enactment of Title VII distinguish the remedial measure here from that at issue in Bakke:

> "[T]he presumption in Griggs--that disparate impact without any showing of business justification established the existence of discrimination in violation of the statute--was based on legislative determinations, wholly absent here, that past discrimination had handicapped various minority groups to such an extent that disparate impact could be traced to identifiable instances of past discrimination.... See, e.g., H.R. Rep. No. 914, 88th Cong., 2d Sess., at 26 (1963) ('Testimony concerning the fact of discrimination in employment is overwhelming')." 57 L.Ed.2d at 783 n.44 (opinion of Powell, J.).

both prohibits "discrimination" and requires "affirmative action," both of which have been interpreted by the Secretary of Labor to require race conscious goals and timetables where there is a deficiency in the utilization of minority workers. 41 C.F.R. Part 60-2. The premise for these requirements is the same as the source for the Executive Order: the procurement authority given to the President by Congress in Titles 40 and 41 of the United States Code. Under this broad grant of authority, the President properly concluded in issuing Executive Order 11246 that it was in the best interests of the United States to insure that its suppliers of goods and services did not indirectly or directly increase costs by perpetuating our exclusion of available minority workers from the active labor pool. See Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159, 170-171 (3d Cir.), cert. denied, 404 U.S. 854 (1971); see also, United States v. New Orleans Public Service, Inc., 553 F.2d

459, 465-468 (5th Cir. 1977); Rossetti Contracting Company, Inc. v. Brennan, 508 F.2d 1039, 1045 n.18 (7th Cir. 1975); Northeast Construction Company v. Romney, 485 F.2d 752, 760-761 (D.C. Cir. 1973).

Because of the Title VII and Executive Order objectives of remedying our nation's pervasive discrimination against minorities, the remedial measures of necessity have included a wide variety of race conscious measures designed to bring the victims of our discrimination into the work place: e.g., monitoring and adjusting scores on purportedly neutral criteria to insure against racially discriminatory impact; engaging in minority-oriented recruitment; establishing training programs for minority trainees; and implementing numerical measures to insure minority participation in an employer's work force.

Not all of these race conscious measures are always necessary for voluntary compliance with Title VII and Executive Order 11246. Nonetheless, each may be appropriate depending, of

course, upon the employer's past practices and deficiency in minority utilization. See, 29 C.F.R. Part 1608 (EEOC Guidelines on Affirmative Action); 41 C.F.R. Part 60-2 (Revised Order No. 4: Affirmative Action Programs for Government Contractors).

Although they are the most controversial of the remedies, race conscious numerical measures providing work place entry to victims of our nation's discrimination have been widely approved as consistent with the remedial objectives of Title VII and Executive Order 11246. As we noted earlier:

(1) Race conscious numerical measures frequently have been premised upon findings of identifiable past discrimination. In Regents of the University of California v. Bakke, 57 L.Ed. 2d 750, 778 (1978) (opinion of Powell, J.), two of the cases cited with approval were Bridgeport Guardians v. Bridgeport Civil Service Commission, 482 F.2d 1333 (2d Cir. 1973), and Carter v. Gallagher, 452 F.2d 327 (8th Cir.) (en banc), cert.

denied, 406 U.S. 950 (1972). In Bridgeport, the court-ordered numerical measure established a minority hiring goal, required future minority applicants to be placed in a separate minority pool, required 50% of the next ten vacancies to be filled from the minority pool, required 75% of the next twenty vacancies to be filled from the minority pool, and required 50% of the vacancies thereafter to be filled from the minority pool until the goal was reached. In Carter, the court-ordered measure also established a minority hiring goal and required 33% of the future hires to be minority until the goal was attained. In both situations, the numerical measures provided work place entry to minority workers who were victims of societal discrimination but who had not necessarily been discriminated against personally by the employers. See also, Morrow v. Dillard, 480 F.2d 1284 (5th Cir. 1978), a post-Bakke[21/]

21. In Morrow v. Dillard, 480 F.2d 1284 (5th Cir. 1978), the Fifth Circuit correctly viewed Bakke as not affecting court-ordered remedies:

decision approving a race conscious numerical measure similar to those in Bridgeport and Carter.[22/]

> "The Bakke decision should not be viewed as a contrary decision of law applicable to the issue of the constitutionality of affirmative hiring relief, but as a decision reaffirming the equitable power of federal courts to remedy the effects of unconstitutional acts through race-conscious means." 480 F.2d at 1284.

22. The courts of appeals in nine circuits have ordered or approved similar numerical measures providing work place entry to minority workers who were victims not of the employers' direct discrimination but of societal discrimination, e.g.:

FIRST CIRCUIT: Associated General Contractors of Mass., Inc. v. Altschuler, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974); Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975);

SECOND CIRCUIT: Rios v. Enterprise Association Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission, 482 F.2d 1333 (2d Cir. 1973); United States v. Wood Lathers Local 46, 471 F.2d 408 (2d Cir.), cert. denied, 412 U.S. 939 (1973);

THIRD CIRCUIT: Erie Human Relations Commission v. Tullio, 493 F.2d 371 (3d Cir. 1974);

(2) Race conscious numerical measures frequently have been premised not upon identified discrimination but

Contractors Association v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971);

FOURTH CIRCUIT: Sherill v. J.P. Stevens & Co., 551 F.2d 308 (4th Cir. 1977);

FIFTH CIRCUIT: NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); Morrow v. Crisler, 491 F.2d 1053 (5th Cir.) (en banc), cert. denied, 419 U.S. 895 (1974); Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969);

SIXTH CIRCUIT: EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975), vac'd and rem'd on other grounds, 431 U.S. 951 (1977); United States v. Masonry Contractors Association, 497 F.2d 871 (6th Cir. 1974); United States v. Local 212, IBEW, 472 F.2d 634 (6th Cir. 1973); Sims v. Local 65, Sheet Metal Workers, 489 F.2d 1023 (6th Cir. 1973); United States v. Local 38, IBEW, 428 F.2d 144 (6th Cir.), cert. denied, 400 U.S. 943 (1970);

SEVENTH CIRCUIT: United States v. Chicago, 549 F.2d 415 (7th Cir. 1977), cert. denied, 434 U.S. 875 (1978); Crockett v. Green, 534 F.2d 715 (7th Cir. 1976); Southern Illinois Builders Association v. Ogilvie, 471 F.2d 680 (7th Cir. 1972);

EIGHTH CIRCUIT: United States v. N.L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973); Carter v. Gallagher, 452 F.2d 327 (8th Cir.) (en banc), cert. denied, 406 U.S. 950 (1972);

NINTH CIRCUIT: United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971).

rather only upon underutilization of minority workers. In Regents of the University of California v. Bakke, 57 L.Ed.2d 750, 778 (1978) (opinion of Powell, J.), two of the cases cited with approval were Associated General Contractors of Massachusetts v. Altschuler, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974); and Contractors Association of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971). In both situations, the numerical measures administratively imposed upon employers provided work place entry to minority victims of societal discrimination. To a certain extent, of course, there had been past racial discrimination by the building trades, but the numerical measures were premised only upon underutilization,[23] and the measures in any event were imposed not on the building trades but on the employers.

23. Although there has been past discrimination in the building trades, the legality of administratively imposed numerical measures providing

(3) Race conscious numerical measures frequently have been adopted

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craft jobs for minority workers has been premised not upon findings of past discrimination but rather upon determinations of minority underrepresentation. In Contractors Association of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971), the court held that statistical evidence "revealing the percentages of utilization of minority group tradesmen in the six trades compared with the availability of such tradesmen in the five-county area, justified the issuance of the order without regard to a finding as to the cause of the situation.... A finding as to the historical reason for the exclusion of available tradesmen from the labor pool is not essential for federal contractual remedial action." 442 F.2d at 177. A similar decision was reached in Associated General Contractors of Massachusetts, Inc. v. Altschuler, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974), where the court upheld a numerical hiring measure which had been imposed under a state executive order designed not to remedy past discrimination but only to redress minority underrepresentation. 490 F.2d at 13, 14 & 19. Gratuitously, if not as an afterthought, the court of appeals observed "that past racial discrimination in Boston's construction trades is in large part responsible for the present racial imbalance." 490 F.2d at 21.

Similar decisions have upheld the 10% set aside for minority business enterprises in §103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. §6705(f)(2), despite the fact

with express disclaimers of any past discrimination. In these situations, as in the previous category, the numerical measures brought into the employers' work forces minority workers who were victims of societal discrimination but not of any specifically identified discrimination. In Teamsters v. United States, 431 U.S. 324, 330 n.4 (1977), this Court, while defining the parameters of retroactive relief under Title VII, gave tacit approval to a prospective numerical measure establishing a minority hiring goal and a one-to-one, minority-to-white implementation ratio.[24] Similar prospective numerical measures, with similar

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that the 10% set aside was premised not on findings of past discrimination but only upon statistical evidence of minority enterprise underrepresentation. For example, in the first post-Bakke decision on the 10% set aside, the Court of Appeals for the Second Circuit upheld the 10% set aside as constitutional while observing that "the absence of such a finding of past discrimination in the legislative history is not determinative." Fullilove v. Kreps, 584 F.2d 600, 606 (2d Cir. 1978).

24. The Teamsters Court commented upon the appropriateness of agreeing to prospective compliance under Title VII:

goals and ratios, were voluntarily

> "The federal courts have freely exercised their broad equitable discretion to devise prospective relief designed to assure that employers found to be in violation of §707(a) of Title VII eliminate their discriminatory practices and the effect therefrom. See, e.g., cases cited in n.51, infra. In this case prospective relief was incorporated in the parties' consent decree. See, supra, at 330-1, n.4." 431 U.S. at 361 n.47.

The voluntarily adopted consent decree referred to by the Court included a broad numerical measure providing work place entry to minority workers:

> "The decree further provided that job vacancies at any company terminal would be filled first '[b]y those persons who may be found by the court, if any, to be individual or class discriminatees suffering the present effects of past discrimination because of race or national origin prohibited by Title VII of the Civil Rights Act of 1964.' Any remaining vacancies could be filled by 'any other persons,' but the company obligated itself to hire one Negro or Spanish-surnamed person for every white person hired at any terminal until the percentage of minority workers at that terminal equalled the percentage of minority group members in the population of the metropolitan area surrounding the terminal." 431 U.S. at 330-331 n.4.

adopted and later upheld in EEOC v. American Tel. & Tel. Co., 556 F.2d 167 (3d Cir. 1977), cert. denied, 57 L.Ed.2d 1161 (1978); United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976); Patterson v. Newspaper & Mail Deliverers Union of New York, 514 F.2d 767 (2d Cir. 1975), cert. denied, 427 U.S. 911 (1976).[25/]

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25. For additional prospective numerical measures contained in voluntary agreements, see, e.g.:

Howard v. Freedman, Civ. No. 74-234 (W.D. N.Y., May 12, 1975) (consent decree establishing a 25% minority hiring goal and a hiring ratio of two minority hires for every three white hires), collateral challenge by whites rejected, Prate v. Freedman, 430 F.Supp. 1373 (W.D.N.Y. 1977), aff'd without opinion, (2d Cir., Oct. 17, 1977), cert. denied, 98 S.Ct. 2274 (1978); see also, Prate v. Freedman, 583 F.2d 42 (2d Cir. 1978) (attorneys fees awarded to minority defendant-intervenors because the collateral challenge was vexatious and unreasonable).

Bolden v. Pennsylvania State Police, C.A. No. 73-2604 (E.D.Pa. June 21, 1974) (consent decree establishing a 9.2% minority hiring goal and a hiring ratio of one minority hire for every two white hires), preliminary injunction on collateral challenge by whites denied, Oburn v. Shapp, 393 F.Supp. 561 (E.D. Pa. 1975),

In each of the foregoing voluntary agreements, prospective numerical measures were deemed necessary for prospective Title VII compliance although past discrimination was expressly denied in each instance. Illustrative is the Steel Industry Consent Decree, which contained two express disclaimers of past discrimination[26/] and which received the judicial recognition in Allegheny-Ludlum that, "[h]ere, of course, we have no judicial finding of unlawful employment discrimination." 517 F.2d at 881 (emphasis in original).

Title VII and Executive Order 11246 place a premium on voluntary compliance with their explicit and implicit remedial objectives. As court after court has concluded, prospective race conscious numerical measures while not necessarily required for voluntary compliance certainly are a considerable portion of the voluntary compliance encouraged by and lawful under Title VII and the Executive Order.

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aff'd, 521 F.2d 142 (3d Cir. 1975), collateral challenge dismissed, 70 F.R.D. 549 (E.D. Pa. 1976), aff'd , 546 F.2d 418 (3d Cir. 1976), cert. denied, 430 U.S. 968 (1977).

United States v. Wood, Wire & Metal Lathers, Int'l Union, 471 F.2d 408 (2d Cir.), cert. denied, 412 U.S. 939 (1973) (consent decree pursuant to which the union was required initially to issue work permits to 100 minority workers, and thereafter for each of the next four years to issue at least 250 work permits on a one-to-one ratio alternatively to one minority worker and to one white worker).

26. See p. 23, supra.

B. Voluntary Adoption Of Race Conscious Measures Under Executive Order 11246 And Under Title VII Has Been Approved Repeatedly By Congress

The significant objectives of Title VII and Executive Order 11246, of encouraging voluntary adoption of race conscious numerical measures which provide work place entry to minority workers, form an integral part of Title VII and the Executive Order. As apparent as these objectives are on the face of and from the uniform interpretation of Title VII and the Executive Order, equally significant is Congress' express ratification of the use of race conscious numerical measures under Title VII and the Executive Order. This ratification--which occurred not just once but on three separate occasions in 1969, in 1971-1972, and in 1978--conclusively establishes the legality of voluntary race conscious numerical measures[27] and further establishes the

27. Far less legislative history has in the past been relied on to interpret provisions of Title VII. For example, in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), this Court agreed with the unanimity of courts of appeals' decisions holding that back pay "may be awarded on a

absence of any conflict between Title VII and the Executive Order.

1. In 1969, Congress Ratified The Use Of Race Conscious Measures Under Executive Order 11246

Shortly after the Philadelphia Plan, with its race conscious numerical goals and timetables, was imposed upon construction contractors in Philadelphia by the Department of Labor under Executive Order 11246,[28] debate arose between the Executive Branch and Congress about the legality of

class basis under Title VII without exhaustion of administrative procedures by the unnamed class members." 422 U.S. at 414 n.8. In reaching this decision, the Court reviewed the 1972 legislative history of Title VII which revealed that the House bill had sought to limit back pay awards only to individuals who had filed charges, that the Senate bill contained no such limitation, and that the Senate version prevailed in the House-Senate conference and was enacted into law. Id. Based upon this legislative history, the Albemarle Court held that back pay could be awarded to unnamed members of the class. As Justice Stewart stated, writing for the Court: "The Congress plainly ratified this construction of the Act in the course of enacting the Equal Employment Opportunity Act of 1972." Id.

28. For a discussion of the Philadelphia Plan, see Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971).; see also, Comment, The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 U.Chi.L. Rev. 723 (1972).

the Plan. As a result of congressional actions flowing from that debate, Congress ratified the use of race conscious goals and timetables.

Administrative debate on this issue was initiated when the Comptroller General, objecting to the goals and timetables of the Philadelphia Plan, issued an opinion finding the Plan to be in violation of Title VII and refusing to approve expenditures on construction projects covered by it. 49 Comp. Gen. 59 (1969). Immediately thereafter, the Attorney General controverted the view held by the Comptroller General, issued an opinion declaring the Plan to be legal, and advised the Secretary of Labor to disregard the Comptroller General's opinion. 42 Op. Att'y Gen. No. 37 (Sept. 27, 1969).

The Comptroller General responded by urging the Senate Subcommittee on Deficiencies and Supplementals to include in a pending supplemental appropriations bill a limitation on the use of federal funds for contractors required to meet any specific goals established for

minority workers. 115 Cong. Rec. 40018-40019 (1969). At the request of Senator Fannin, the Subcommittee followed the Comptroller General's suggestion and attached the following rider:

> "No part of the funds appropriated or otherwise made available by this or any other act shall be available to finance, either directly or through any federal aid or grant, any contract or agreement which the Comptroller General of the United States holds to be in contravention of any federal statute." 115 Cong. Rec. 40013 (1969).

During this same period, Senator Ervin, as Chairman of the Senate Subcommittee on Separation of Powers, held hearings to determine if the revised Philadelphia Plan violated the separation of powers by contravening the intent of Congress in the Civil Rights Act of 1964. The testimony before Ervin's subcommittee, principally that of Comptroller General Staats, later was introduced into the Congressional Record during the Senate debate on the Fannin rider. 115 Cong. Rec. 16799-16802 (1969). See also, 115

Cong. Rec. 16729-16733 (1969).

Senate debate on the Fannin rider revolved around two issues. Several senators were of the view that the primary issue was maintaining the independence of the Comptroller General's office free from Executive Branch interference. See, e.g., Remarks of Senator Allott at 115 Cong. Rec. 39963 (1969). Other senators believed that the only issue was the legality of race conscious goals and timetables. To Senator Hruska, for example, the intent of Congress in debating the Fannin rider was unmistakable:

> "The fact is that not only the Philadelphia Plan is involved. A similar series of contracts is being negotiated and very likely will soon be in effect in Boston and some seven, eight cities. Mr. President, that presents quite a problem. Being aware of that problem and having the question before us as to where this authority and those contracts are entered into, then the question will be raised when the time comes to debate the legality of these plans. Did not the Congress acquiesce in a practice along that line...the Congress knew what was

> going on and yet raised no objection. In view of these considerations, I think that this bill is a legitimate vehicle for saying this is the time and place to confront the issue." 115 Cong. Rec. 39961 (1969).

Any ambiguity as to whether the Senate was addressing the dispute between the Comptroller General and the Attorney General was removed when the Senate rejected amendments to the Fannin rider that would have limited its effect only to resolving that dispute. 115 Cong. Rec. 39973 (1969). With the issue then focused solely on the legality of race conscious goals and timetables, the Senate passed the Fannin rider 74-0 with 26 abstentions.

When the bill, with the Fannin rider attached, reached the House, most of the debate focused on the use of race concious goals and timetables. Among the opponents of the Fannin rider in the House was Representative Gerald Ford. In his remarks, he vigorously supported the legality of the goals and timetables as authorized by earlier civil rights legislation:

"In the early 1950's and in the 1960's the Congress passed far-reaching civil rights legislation involving social rights...protecting the rights of minorities--open housing and other rather sweeping legislation to protect people against discrimination because of race, creed, and color.

"Now let me say this: All of those social rights are important, but if you do not have a job, it does not do you much good in some of these cases. If you do not have a job to earn the money to buy a house, then open housing legislation does not do you one bit of good. If you do not have a job to earn a living for your family, it does not do you any good in many of these other areas, many of the other areas where Congress has given protection against discrimination.

"This rider prevents minority groups from getting a job in a meaningful way. This rider precludes the opportunity for job equality under Federal contracts. Make no mistake about that.... An 'aye' vote is going to mean you vote to perpetuate job discrimination in Federal contracts. A 'nay' vote means that individuals will have the protection of the Federal Government in getting jobs. Minority groups will have an opportunity to earn a living so that they can enjoy the fruits of social legislation which the Congress has passed

in the last two decades." 115 Cong. Rec. 40907 (1969).

After vigorous debate, the House deleted the rider by a vote of 208 to 156. 115 Cong. Rec. 40921 (1969). Upon reconsideration in the Senate, the Senate by a vote of 39-29 also voted to delete the Fannin rider. 115 Cong. Rec. 40749 (1969).

Although both the Senate and House debates on the Fannin rider were somewhat confused because of the separation of powers issue, there is no doubt that Congress was well aware of the race conscious goals and timetables in the Philadelphia Plan. As Senator Hruska emphasized: "Congress knew what was going on and yet raised no objection." 115 Cong. Rec. 39961 (1969).

2. In 1971-1972, Congress Again Ratified The Use Of Race Conscious Measures Under Executive Order 11246 And Incorporated The Order Into Title VII

The next debates in Congress on the appropriateness of race conscious numeri-

cal measures occurred in 1971-1972 during Congress' consideration of the Equal Employment Opportunity Act of 1972, the bill which extended and considerably strengthened Title VII. As this Court pointed out in Occidental Life Insurance Co. v. EEOC, 432 U.S. 355 (1977), the "dominant Title VII battle in the 92nd Congress was over what kind of additional enforcement power should be granted to the EEOC." 432 U.S. at 361. Since part of that battle concerned the potential transfer of Executive Order enforcement powers to the EEOC, there was considerable debate on the appropriateness of race conscious numerical measures. As a result of Congress' focus on this issue, Congress reaffirmed the legality of race conscious numerical measures not only under Executive Order 11246 but also under Title VII.

Debate in the House on H.R. 1746 centered upon an amendment offered by Representative Dent which would have prohibited the EEOC, with its proposed Executive Order enforcement powers, "from imposing or requiring a quota or

preferential treatment with respect to numbers of employees of any race, color, religion, sex or national origin." 117 Cong. Rec. 31784, 31981, 31984 (1971).

In a colloquy with Representative Pucinski, Representative Dent explained the purposes of his amendment:

> Mr. PUCINSKI. Mr. Chairman, I take this time to ask the chairman of the subcommittee a question for the purpose of establishing some legislative history here.
>
> He will offer an amendment which will provide that the Commission shall be prohibited from requiring a quota for preferential treatment with respect to the numbers of employees or percentages of employees of any class, color, religion, sex, or national origin.
>
> I am puzzled and troubled with the word "quota," because in the Philadelphia Plan the administration had very stubbornly insisted, and there was extensive debate on the floor of the House here, that they were not using quotas in Philadelphia but they were using "goals." What I want to know is whether or not the use of the word "quota" here in this amendment applies to "goals" or any other phraseology which in effect would require an employer to employ a certain amount of people of various racial and ethnic categories mentioned here.

Mr. DENT. The gentleman asked me the question yesterday, and I looked up the word "goals" and I cannot find where goals has any specific meaning that would lend it to any plan which would say a certain number or quota. The word "quota" is a very plain word.

Mr. PUCINSKI. Does the prohibition against "quota" in this amendment apply to "goals" or to any other method or scheme used by the administrators of this act?

Mr. DENT. I would say the word "quota" and the prohibition of quotas in the Commissions' administration of the Federal contract compliance program means exactly what it is intended to mean, that under any condition this Commission cannot establish a set number or quota of workers in any category that must be present.

Mr. PUCINSKI. If they plead as they did in the case of the Philadelphia plan that they were not establishing quotas but merely establishing goals, this would be interpreted as meaning they are in violation of this act.

Mr. DENT. That is right, if what they are establishing is a quota or preferential treatment.

117 Cong. Rec. 31975 (1971).

Following further debate, Representative Erlenborn introduced a substitute amendment maintaining the status quo. Representative Dent objected:

> "The Erlenborn amendment leaves things exactly as they are.
>
> "We say in my amendment that it was the intent of Congress that there should be no quotas and that there should be no preferential treatment. In our amendments we specifically prohibit the use of quotas. We prohibit the establishment of preferential treatment." 117 Cong. Rec. 32089 (1971).

The Erlenborn substitute was adopted and the Dent amendment rejected. 117 Cong. Rec. 32111-32112 (1971).

Debate and action in the Senate, even more conclusive than that in the House, centered upon two proposed amendments offered by Senator Ervin to S.2515. Both amendments, which would have gutted the permissible use of numerical measures, were rejected. The first amendment offered by Senator Ervin stated:

> "No department, agency, or officer of the United States shall require an employer to practice discrimination in reverse by

employing persons of a particular race, or a particular religion, or a particular national origin, or a particular sex in either fixed or variable numbers, proportions, percentages, quotas, goals, or ranges. If any department, agency, officer, or employee of the United States violates or attempts or threatens to violate the provisions of the preceding sentence, the employer or employee aggrieved by the violation, or attempted or threatened violation, may bring a civil action in the United States District Court in the District in which he resides or in which the violation occurred, or is attempted or threatened, or which the enterprise affected is located, and the District Court shall grant him such relief by way of temporary interlocutory or permanent injunctions as may be necessary to redress the consequences of the violation, or to prevent the attempted or threatened violation." 118 Cong. Rec. 1662 (1972).

On its face, Senator Ervin's first amendment was intended to bar the use of numerical measures in providing work place entry to minority workers. In his words, "it forbids discrimination in reverse." 118 Cong. Rec. 1663 (1972).

Among the opponents of Senator Ervin's first amendment was Senator Javits, who spoke at length in favor of the Philadelphia plan and in favor of race conscious numerical measures in general. 118 Cong. Rec. 1664-1676 (1972). In the course of his remarks, he summarized his opposition to the first Ervin amendment as follows:

> "I believe that the amendment does two things, both of which should be equally rejected.
>
> "First, it would undercut the whole concept of affirmative action as developed under Executive Order 11246 and thus preclude Philadelphia-type plans.
>
> "Second, the amendment, in addition to dismantling the Executive Order program, would deprive the courts of the opportunity to order affirmative action under Title VII of the type which they have sustained in order to correct a history of unjust and illegal discrimination in employment, and thereby further dismantle the efforts to correct these injustices." 118 Cong. Rec. 1665 (1972).

In support of his position, Senator Javits spoke approvingly of the numerical measures upheld in Contractors Ass'n of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3d

Cir.), cert. denied, 404 U.S. 854 (1971), and in United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971), see 118 Cong. Rec. 1664-1665 (1972), and inserted into the Congressional Record copies of the courts of appeals' decisions in those cases, see 118 Cong. Rec. 1665-1675 (1972). Significantly, Senator Javits also spoke approvingly of the use of race conscious numerical hiring measures adopted voluntarily by employers in consent decrees, see 118 Cong. Rec. 1675 (1972), and inserted into the Congressional Record a copy of a report describing and summarizing two voluntarily adopted race conscious numerical measures, see 118 Cong. Rec. 1675-1676 (1972).

On a vote of 22 yeas, 44 nays, 34 not voting, the first Ervin amendment was defeated. 118 Cong. Rec. 1676 (1972).

Undaunted, Senator Ervin next introduced a similar amendment. His second amendment proposed to amend §703(j) of the Act, 42 U.S.C. §2000e-2(j), to prohibit all federal agencies from requiring the adoption of numerical measures. 118

Cong. Rec. 4917-4918 (1972). As Senator Ervin explained:

> "In short, this [amendment] would make it unlawful for the EEOC, the Office of Federal Contract Compliance, or any other federal agency or department in seeking to prevent so-called discrimination in employment from practicing discrimination in reverse such as is being practiced every day by the EEOC and also by the Office of Federal Contract Compliance." 118 Cong. Rec. 4917 (1972).

Senator Javits objected to the amendment on the grounds that the Senate had already decided the issue: "we voted on that here; we debated it and we decided it." 118 Cong. Rec. 4918 (1972). In response, Senator Ervin admitted that the "same question is involved." 118 Cong. Rec. 4918 (1972). Nonetheless, Senator Ervin added: "I sincerely hope that the Senate will agree to the amendment." 118 Cong. Rec. 4917 (1972). It didn't. Senator Ervin's second amendment was defeated even more convincingly than his first amendment: 30 yeas, 60 nays, 10 not voting. 118 Cong. Rec. 4918 (1972).

3. In 1978, Congress Yet Again Ratified The Use Of Race Conscious Measures Under Executive Order 11246

In 1978, during and subsequent to this Court's deliberations in Bakke, Congress again debated the appropriateness of race conscious numerical measures. Again, Congress ratified the use of such numerical measures.

The legislative vehicle in 1978 was an appropriations bill for HEW and for the Department of Labor. Under different amendments offered in the House and the Senate, those agencies would have been prohibited from using their appropriations under the bill in a manner which would require any individual or entity to adopt certain race conscious numerical measures.

Although both amendments were adopted, both thereafter were deleted by the House-Senate Conference--with the result that Congress enacted the appropriations bill, Pub.L.No. 95-480 (Oct. 18, 1978), 92 Stat. 1567, with no restrictions on the continued use of race conscious numerical measures.

The House amendment, introduced by Representatives Walker and Levitas, was directed at prohibiting HEW and the Department of Labor from requiring the adoption of most numerical measures:

> "No part of any appropriation contained in this Act may be obligated or expended in connection with the issuance, implementation, or enforcement of any rule, regulation, standard, guideline, recommendation, or order which includes any ratio, quota, or other numerical requirement related to race, creed, color, national origin, or sex, and which requires any individual or entity to take any action with respect to (1) the hiring or promotion policies or practices of such individual or entity, or (2) the admissions policies or practices of such individual or entity." 124 Cong.Rec. 5371 (1978).

Despite the breadth of the amendment's language, its supporters focused on the use of quotas. According to Representative Walker, "the purpose of this amendment is to prohibit funding for any quota system within the Department of Health, Education, and Welfare and the Department of Labor so that practices of reverse discrimination can be stopped." 124

Cong. Rec. 5371 (1978). In a colloquy with Representative Levitas, Representative Walker indicated that the amendment would affect other numerical measures but not goals and timetables:

> "Mr. LEVITAS. My question is, Is it quite clear that this amendment would not prohibit the use of affirmative action programs that do not rely upon or utilize numerical quotas, numerical ratios, or other numerical requirements, but could use such things as goals or timetables?
>
> "Mr. WALKER. I think that is very clear in this amendment." 124 Cong. Rec. 5372 (1978).

As the debate in the House proceeded, there was understandable confusion about which numerical measures would be prohibited and which would not. Despite this confusion, the amendment was bitterly opposed by a number of representatives. Speaking in opposition, Representative Mitchell stated that minorities would not be able to move

> "from our present holding plateau level unless we have some affirmative action that has some targets, some timetables. It has to have

> a basis in numbers." 124 Cong. Rec. 5374 (1978).

Representative Fenwick echoed this concern:

> "What we have been trying to do is to make sure that our fellow citizens are given for once a fair chance." 124 Cong. Rec. 5376 (1978).

After further debate, the amendment was passed 232-177.

The amendment in the Senate was offered by Senator Hayakawa on behalf of Senator Helms. Although they were aware of the breadth of the House amendment, Senators Hayakawa and Helms directed their amendment not at the Department of Labor but only at HEW. The Hayakawa-Helms amendment also differed from the amendment in the House in that it prohibited HEW only from requiring a "quota...with respect to the admissions policies or practices of any institution of higher education." 124 Cong. Rec. 16280 (1978). In extended remarks, the two Senators explained that this amendment in fact was directed only at HEW requirements

for fixed and rigid quotas in educational admissions in higher education. 124 Cong. Rec. 16280-16283 (1978). With very little debate, the amendment was adopted on a voice vote. 124 Cong. Rec. 16283 (1978).

The amendments, however, did not survive further congressional scrutiny. Both amendments were deleted from the appropriations bill by the House-Senate Conference. See Report No. 95-1746, 95th Cong., 2d Sess., 25 (Oct. 6, 1978). Specifically, the House-Senate Conference Committee:

> "Delete[d] language proposed by the House which would have prohibited the use of funds in the bill in connection with the issuance, implementation, or enforcement of any rule, regulation, standard, guideline, recommendation, or order which includes any ratio, quota, or other numerical requirement related to race, creed, color, national origin, sex, and which requires any individual or entity to take any action with respect to (1) the hiring or promotion policies or practices of such individual or entity, or (2) the admissions policies or practices of such individual or entity." Id.

The House-Senate Conference Committee also:

> "Delete[d] language proposed by the Senate which would have prohibited the use of funds in the bill in connection with the issuance, implementation, or enforcement of any rule, regulation, standard, guideline, recommendation, or order which includes any quota related to race, creed, color, national origin, or sex, and which requires any individual or entity to take any action with respect to the admissions policies or practices of any institution of higher education." Id.

With no language restricting the ability of HEW or the Department of Labor to require the adoption of race conscious numerical measures, the appropriations bill was then enacted into law by Congress. Pub.L.No. 95-480 (Oct. 18, 1978), 92 Stat. 1567.

4. Based Upon This Legislative History, Federal Agencies Have Affirmatively Sanctioned The Voluntary Use Of Race Conscious Measures

Pursuant to authority delegated to them, and based upon the 1969 and 1971-1972 legislative history reviewed above, federal agencies in the discharge of

their responsibilities have issued regulations and guidelines uniformly encouraging voluntary compliance through the adoption of race conscious numerical measures. Three sets of regulations and guidelines have particular applicability to private employers.

(1) 41 C.F.R. Part 60-2, the Department of Labor pursuant to §201 of Executive Order 11246 has set forth its regulations on Affirmative Action Programs for Government Contractors, also known as Revised Order No. 4.

(2) In 29 C.F.R. Part 1607, the EEOC pursuant to §713 of its Act, 42 U.S.C. §2000e-12, has set forth its Uniform Guidelines on Employee Selection Procedures which in §1607.13B and §1607.17 incorporate the federal Policy Statement on Affirmative Action.[29/] The

29. This Policy Statement on Affirmative Action was first issued at 41 Fed. Reg. 38814 (Sept. 13, 1976), by the member agencies of the federal Equal Employment Opportunity Coordinating Council, an umbrella Council created in 1972 by §715 of the Act, 42 U.S.C. §2000e-14. On July 1, 1978, all functions of the Council were transferred to the EEOC and the Council was abolished. See Executive Order 12067, 43 Fed. Reg. 28967 (July

identical Guidelines and Policy Statement of the Department of Labor are set forth at 41 C.F.R. Part 60-3; of the Department of Justice are set forth at 28 C.F.R. Part 50.14; and of the Civil Service Commission are set forth at 5 C.F.R. Part 300.103(c).

(3) In 29 C.F.R. Part 1608, the EEOC pursuant to §713 of its Act, 42 U.S.C. §2000e-12, has set forth its Affirmative Action Guidelines.

Each of the foregoing three sets of regulations and guidelines authorizes and encourages nearly identical procedures for the adoption of race conscious numerical measures: each encourages employers to determine whether they are deficient in the utilization of minority workers; and each encourages voluntary adoption of race conscious numerical measures to overcome any utilization deficiencies especially where an employer has reason

5, 1978), implementing Presidential Reorganization Plan No. 1, 43 Fed. Reg. 19807 (May 9, 1978). Because the functions of the Council terminated, the EEOC and the other agencies thereafter reissued the Policy Statement on Affirmative Action, 43 Fed. Reg. 38290 (Aug. 25, 1978).

to believe that its employment practices have had a racially exclusionary effect in the past.

Agency regulations and guidelines interpreting remedial legislation, of course, are ordinarily entitled to great weight. E.g., Lau v. Nichols, 414 U.S. 563, 571 (1974) (concurring opinion of Stewart, J.); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). Yet, here there are two reasons to pay even greater deference to these regulations and guidelines. First, the latter two sets of guidelines were issued not only pursuant to Title VII but also pursuant to Executive Order 12067, 43 Fed. Reg. 28967 (July 5, 1978),[30/] in which the President expressly directed the EEOC on behalf of all federal agencies to "develop uniform standards, guidelines and policies defining the nature of employment discrimination" and expressly directed that all "agencies shall comply with all final rules, regulations, policies, procedures or orders of the" EEOC. In view of this

30. See note 29, supra.

express Presidential authorization, the guidelines are entitled to tremendous deference. See, Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976).

A second and equally compelling reason to pay even greater deference to these regulations and guidelines, see Regents of the University of California v. Bakke, 57 L.Ed.2d 804-806, 823 (1978) (opinion of Brennan, J.), is that they are consistent both with the intent of Title VII and the Executive Order, and with the repeated congressional ratification of race conscious numerical measures.

5. There Is No Conflict Between Executive Order 11246 And Title VII

Neither Congress, in its many deliberations over race conscious numerical measures under Title VII and Executive Order 11246, nor the many federal agencies which have issued affirmative action regulations and guidelines under Title VII and Executive Order 11246 have been able to discover any conflict between Title VII

and Executive Order 11246. There in fact is no conflict.

Nonetheless, a majority of the court of appeals below somehow discerned a conflict and thereupon held that the race conscious requirements of Executive Order 11246 "must fall before Title VII's direct congressional prohibition" against discrimination. 563 F.2d at 216.

Although the majority below, having found a conflict, correctly looked to Justice Jackson's concurring opinion in Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 634-660 (1952), the majority below erred first by failing to understand that there was no conflict, second by not recognizing the express sources of Presidential power here, third by refusing to review Congress' repeated approval of race conscious numerical measures under Title VII and the Executive Order, and finally by misapplying Justice Jackson's analytical framework set forth in Youngstown.

In his concurring opinion in Youngstown, Justice Jackson established three categories for determining the validity

of Presidential powers which conflict with those of Congress:

> "1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances ... [Presidential action] would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.
>
> "2. When the President acts in absence of either a congressional grant or denial of authority...there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, Congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.
>
> "3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb... [and any] claim to a power at once so conclusive and preclusive must be scrutinized with caution." 343 U.S. at 635-638.

In Youngstown, Justice Jackson placed President Truman's Executive Order seizure of the steel mills in category three because, as a majority of the Court recognized, Congress on a number of occasions prior to 1952 considered and explicitly rejected proposals which would have given the President power to seize the mills. 343 U.S. at 585-589. The majority below, based only upon a wooden understanding of Justice Jackson's analysis, placed Executive Order 11246 also in category three. 562 F.2d at 216.

Not understood by the majority below, Executive Order 11246 is based upon the procurement powers expressly authorized by Congress in Titles 40 and 41 of the United States Code. See discussion at pp. 61-62, supra. And not recognized by the majority below, the use of race conscious numerical measures has been repeatedly ratified by Congress. See discussion at pp. 74-95, supra. Thus, even if there were any discernible conflict between Title VII and the Executive Order here, Executive Order 11246 would be placed in Justice Jackson's first

category where it "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation." 343 U.S. at 636.

The error of the majority below, however, was even more fundamental. As we have explained in Point A, supra, there can be no conflict at all because both Title VII and the Executive Order are directed toward the same end of voluntary compliance through the adoption of race conscious numerical measures providing work place entry to minority workers.

C. Even Under The Erroneous Theory Of The Case Urged By Respondents, The District Court Erred In Failing To Join A Representative Of The Affected Black Employees As A Necessary Party Under Rule 19(a) And In Failing To Allocate Properly The Burdens Of Proof

Respondents' theory, that a finding of unlawful discrimination against minority workers is a pre-condition to approval of a privately established race conscious remedial measure, pre-supposes the potential for a genuine adversary judicial hearing on the issue of the existence (or non-existence) of on-site racial discrimination. Given the parties before the district court in this case, such an adversary hearing was an impossibility.

Respondents, of course, had no interest in arguing that racial discrimination in hiring or promotion existed at the Gramercy plant. Kaiser, mindful of its potential liability under Title VII, certainly had no interest in presenting evidence of racial discrimination at its Gramercy plant.[31/] The

31. A finding that racial discrimination had occurred at the Gramercy plant would have

Steelworkers, which, ordinarily would be expected to represent the interests of the affected minority workers, was similarly inhibited from establishing the existence of racial discrimination at the Gramercy plant since proof of racial discrimination would have exposed the Steelworkers to Title VII liability and would have raised questions concerning a possible breach of the duty of fair representation. E.g., Humphrey v. Moore, 375 U.S. 335 (1964). Thus, each participant before the district court possessed a strong pecuniary interest in denying that racial discrimination had occurred. Not surprisingly, therefore, the parties before the district court--although divided on the issue of whether a finding of racial discrimination was necessary to validate the plan--were in comfortable agreement that no racial

collaterally estopped Kaiser in any subsequent Title VII action seeking back pay. Parklane Hosiery Company, Inc. v. Shore, 47 U.S.L.W. 4079 (Jan. 9, 1979) (No. 77-1305). Kaiser was already under attack for allegedly discriminating at its nearby Chalmette plant. Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374 (5th Cir. 1978).

discrimination had taken place. The district court placed its imprimatur on this exculpatory consensus by entering a finding that no racial discrimination had occurred at Kaiser's Gramercy plant. Such a procedure does not satisfy minimum procedural standards of fairness and certainly cannot provide the basis for setting aside a private plan aimed at eradicating the effects of reasonably apprehended racial discrimination.

First, given the non-adversary posture of the parties on the question of racial discrimination, no case or controversy existed on the issue. E.g., Moore v. Charlotte-Mecklenburg Board of Education, 402 U.S. 47 (1971); United States v. Johnson, 319 U.S. 302 (1943). See generally, Muskrat v. United States, 219 U.S. 346 (1911).[32]

32. The lack of a case or controversy on the question of racial discrimination strips the district court of power to enter a finding as to its existence. While Amici do not suggest that Kaiser and the Steelworkers acted in bad faith, toleration of non-adversary fact-finding on the question of racial discrimination virtually invites collusive litigation. For example, an employer facing potential Title VII difficulties might be tempted to promulgate a voluntary plan, never intending to enforce it, and await challenge by adversely affected white workers. Since, as in the district court in this case, no party to such a challenge would be motivated to offer proof that discrimination had occurred, the court would, as did the district judge below, enter a finding of non-discrimination. The employer would then be in a position to use the findings as stare decisis if not collateral estoppel, against minority workers alleging Title VII liability.

Second, even if a bare case or controversy was presented, settled principles of judicial administration require the joinder of affected black workers as necessary parties-defendants under Rule 19(a).[33] E.g., Provident Tradesmen Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968); Lumberman's Mutual Cas. Co. v. Elbert, 348 U.S. 48 (1954); Western Union Telegraph Co. v. Pennsylvania, 368 U.S. 71 (1961). See generally, Shields v. Barrow, 17 How. 130, 139 (1854).

33. Once joined as necessary parties under Rule 19(a), consideration could be given to certifying the joined black workers as class representatives under Rule 23. In the absence of retained counsel, court appointed counsel for the class would be possible.

Rule 19(a) provides that an available person "shall be joined as a party" if he claims an interest relating to the subject of the action which, as a practical matter, might be seriously impaired by the disposition of the action. Rule 19(a)(2)(i) FRCP.[34] Minority employees at Kaiser's Gramercy plant clearly fall within such a description of a Rule 19(a) "necessary" party. E.g., Provident

34. Rule 19(a) states:

"Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action." Rule 19(a) F.R.C.P.

Tradesman Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968).[35] Accordingly, the district court was under an obligation to order joinder of the affected minority workers under Rule 19(a). English v. Seaboard Coast Line R.R., 465 F.2d 43 (5th Cir. 1972). Of course, the failure of the parties before the district court to insist upon joinder cannot relieve that court from its obligation to order the joinder of available "necessary" parties whose interests were not adequately represented by the parties actually before the court. As Mr. Justice Harlan noted in discussing Rule 19 in Provident Tradesmen:

> "When necessary...a court of appeals should, on its own

35. Given the amenability of minority employees at the Gramercy plant to service of process and given the non-diversity jurisdictional base of respondents' complaint, the "availability" of the minority employees under the first sentence of Rule 19(a) is not open to question. It is, therefore, not necessary to consider whether the affected minority employees would be "indispensible" parties under Rule 19(b). Provident Tradesmen Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968).

initiative, take steps to protect the absent party, who of course had no opportunity to plead and prove his interest below." 390 U.S. at 111.

Amici do not suggest that in an ordinary Title VII case, employees whose interests are potentially adversely affected must be joined as necessary parties. In such ordinary Title VII contexts, the named defendants--typically the employer and the union--will generally represent the interests of the potentially affected employees in an adequate manner. See generally, Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir. 1970). In ordinary Title VII contexts, the duty of fair representation owed by a union to all employees--minority and white--may be relied upon to render the union an adequate surrogate for potentially affected employees. Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969). Unlike an ordinary Title VII case, however, the union in this case was confronted with an insurmountable conflict of interest. In order to serve the interest of the absent minority

workers, the union would have been required to introduce evidence of past racial discrimination at the Gramercy plant--evidence which would have exposed the union treasury to potential Title VII liability. When, as here, a union's pecuniary interests are in direct conflict with the interests of absent employees, the union cannot be relied upon to act as the surrogate for the absent employees. English v. Seaboard Coast Line Railroad, 465 F.2d 43 (5th Cir. 1972); Hayes v. Seaboard Coast Line R.R., 3 C.C.H. E.P.D. ¶8169 (S.D. Ga. 1971); Banks v. Seaboard Coast Line R.R., 51 F.R.D. 304 (N.D. Ga. 1970). Cf., Airline Stewards and Stewardesses Ass'n v. American Airlines, Inc., 490 F.2d 636 (7th Cir. 1973).[36] Thus, at a minimum, the judg-

36. Given the clear applicability of Rule 19(a), it does not appear necessary to consider whether notions of procedural due process could be violated by permitting the issue of racial discrimination to be litigated in the absence of the only affected party with an interest in proving it. However, decisions of this Court make clear that notice and an opportunity to participate in the hearing are fundamental elements of procedural due process of law. E.g., Mullane v. Central

ment below must be vacated and the case remanded for a hearing at which potentially affected minority workers must be joined as parties-defendants.

Since, even under respondent's view of the case, additional proceedings would be necessary in the district court, it is appropriate to consider the proper procedures which the district court should follow on remand.

First, the district court should consider whether the minority workers joined under Rule 19(a) should be treated as the representatives of a Rule 23 class or whether each affected worker should be individually joined. Second, the district court should assure that the joined minority employees are adequately

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Hanover Bank & Trust Co., 339 U.S. 306 (1950). Indeed, the fact that notions of due process would almost certainly prevent the district court's findings on racial discrimination from being given preclusive effect create the very real possibility that both Kaiser and the union will be subjected to inconsistent adjudication on the issue. Such a possibility is yet another basis for invoking Rule 19. See Rule 19(a)(2)(ii) F.R.C.P.

represented by competent counsel.

Third, the district court should provide the joined minority employees with an opportunity to assert cross-claims for relief pursuant to Rule 13(g) against Kaiser and the Steelworkers as co-defendants.

Fourth, the district court should encourage the settlement of any such cross-claims in accordance with the long standing policy of the Fifth Circuit. E.g., United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976). Any such bona fide settlement could be incorporated in a consent decree terminating the Rule 13(g) cross-claims. Such a consent decree should constitute sufficient judicial validation of the existence of racial discrimination to satisfy even respondents.

Finally, if settlement of the cross-claims proves impossible, the parties would proceed to trial on the issue of racial discrimination. Since respondents here are plaintiffs below seeking to set aside the status quo (consisting of the

privately established plan), orthodox evidentiary analysis allocates the persuasion and production burdens on the issue of racial discrimination to them. Where a plaintiff (either the government or a private party) seeks to compel an unwilling defendant to alter his status quo in favor of a race conscious remedy, the plaintiff appropriately bears the burden of proof on the facts needed to establish the claim. Furnco Construction Co. v. Waters, 57 L.Ed.2d 957 (1978). Where, as here, a plaintiff seeks to set aside an existing privately established plan, he should bear a similar burden of proof. See generally, James, Burdens of Proof, 47 U.Va.L.Rev. 51 (1961). Moreover, modern analysis suggests that a court's decision as to the allocation and size of the burden of proof is, often, an attempt to deflect error in accordance with strongly held social policies. E.g., Mullaney v. Wilbur, 421 U.S. 624 (1975); Patterson v. New York, 432 U.S. 197 (1977); In re Winship, 397 U.S. 358 (1969). See generally, Underwood, The Thumb on the Scale of Justice: Burdens of Persuasion

in Criminal Cases, 86 Yale L.J. 1299 (1977); Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, 12 Stan.L.Rev. 5 (1959). Two strong social policies coalesce in imposing the burden of proof on persons seeking to set aside privately adopted plans aimed at remedying reasonably apprehended racial discrimination. First, racial discrimination is and has been for 25 years, this nation's most pressing social problem. The docket of this Court over the past generation bears witness to our nation's struggle against bigotry and racism--a struggle which, while not yet successful, is, nevertheless, a source of some pride. Where reasonable grounds exist for persons to believe that racial discrimination has occurred, it is consistent with our national commitment to eradicating racial discrimination against vulnerable minorities to require persons seeking to frustrate remedial action to demonstrate that no such remedial action is necessary. Second, as Amici have noted at pp. 42-55, supra, a core principle of American jurisprudence is the encouragement of

"private ordering." See generally, H. Hart & A. Sachs, The Legal Process: Basic Problems in the Making and Application of Law, 183-185 (Unpub. Ed. 1958). Thus, when private parties seek in good faith to assist in resolving a pressing social problem, we should be loathe to reject their private established remedial plans. Where, as here, persons have in good faith used "private ordering" in the struggle to remedy the effects of reasonably apprehended past racial discrimination, the burden of proof should lie with persons seeking to set aside the plan. Put bluntly, error should be deflected in favor of good faith private attempts to cope with reasonably apprehended racial discrimination.

Finally, even if the burden of proof on the issue of racial discrimination is deemed to rest with the joined minority employees, the evidence demonstrates the clear existence of an unrebutted prima facie case of discrimination at the Gramercy plant. See pp. 9-16, supra. Suffice it to say that the evidence concerning the Gramercy plant would

parallel the evidence found by the Fifth Circuit to constitute a prima facie case of discrimination at the nearby Chalmette plant. Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374 (5th Cir. 1978). In accordance with standard Title VII practice, the establishment of a prima facie case would shift the production burden to Kaiser, the union and the respondents to rebut the prima facie case with evidence demonstrating a non-racial explanation for the apparently discriminatory pattern. E.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971); McDonnell Douglas v. Green, 411 U.S. 792 (1973). If the prima facie case were successfully rebutted, traditional Title VII practice requires that the persuasion burden remain with the minority employees. Furnco Construction Corp. v. Waters, 57 L.Ed.2d 957 (1978).

Whatever the wisdom of imposing the persuasion burden on Title VII plaintiffs in an ordinary case, Amici believe that the persuasion burden should be borne by persons seeking to set aside a good faith private remedial plan. It is unnecessary

to resolve the question at this stage of the case, since the parties have not shown an ability to rebut the prima facie case.

Thus, on remand, unless the case is settled, Kaiser and the Steelworkers, at a minimum, would be obliged to rebut a prima facie case of discrimination, rather than presenting no evidence, as they did below.

CONCLUSION

For the reasons set forth in Points A and B, the judgment below should be reversed. If the judgment is not reversed, it nonetheless should be vacated and remanded for the reasons set forth in Point C.

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